

THE GENERATOR COMMISSIONING CLAUSE

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WHAT IS THE “GENERATOR COMMISSIONING CLAUSE”?

Under the Generator build model, offshore wind developers carry out construction not only of their generation assets, but also the transmission assets that will connect said generation to the onshore transmission grid.

"The GCC permits wind farm developers to convey electricity over an offshore transmission line for 18 months from the issue of a completion notice, after which period, the transmission assets must be transferred to a licenced offshore transmission assets owner."

The UK's Electricity Act 1989 (“EA 1989”) makes it a criminal offence to participate in transmission of electricity without a licence¹. The Energy Act 2013 amended the EA 1989 to introduce section 6F (known colloquially as “the generator commissioning clause” or the “GCC”) which creates an exception to the prohibition of offshore transmission activity during a commissioning period in certain circumstances. In broad terms, the GCC permits wind farm developers to convey electricity over an offshore transmission line for 18 months from the issue of a completion notice (as issued by the National Electricity Transmission System Operator), after which period, the transmission assets must be transferred to a licenced offshore transmission assets owner (“OFTO”). Importantly, section 5 EA 1989 confers on the Secretary of State (“SOS”) the power to grant an exemption from the s4 prohibition on transmission.

The GCC is intended to allow time for testing and snagging by the generator, the technical demonstration of the transmission assets to bidders, Ofgem to run its tender process and select a preferred bidder for the OFTO assets and provide time to finalise commercial negotiations ahead of the divestment of the transmission assets to the OFTO. Absent any specific exemption under s5, should the divestment of OFTO assets not complete before the GCC window expires, any continued transmission by the generator would be a strict liability criminal offence under s4 EA 1989.

WHY IS THE GENERATOR COMMISSIONING CLAUSE PROBLEMATIC?

The single biggest challenge generators face is reconciling the GCC period with the OFTO divestment timescale. There is a fundamental disconnect between the two whereby the EA 1989 contemplates an 18-month period from completion of the project, by the end of which divestment must occur (for the generator to avoid committing a criminal offence), however, the process for and timing of the divestment transaction is a completely separate, competitive tender process regulated by Ofgem which, as we have seen in the past, is often subject to numerous delays outside the control of the generator and, on many occasions, Ofgem too.

In the last two tender rounds of OFTO transactions (Rounds 5 and 6), the majority of projects have come perilously close to the end of their GCC period before the divestment has completed. In order to prevent the wind farm generators from being placed in the unenviable position of having to make a stark choice between either committing a criminal offence or switching off until the OFTO assets have divested, the SOS has granted a number of exemptions. WFW was closely involved in the process for both exemptions, acting for a number of generators in both tender rounds.

The SOS granted individual exemptions for all but one project in TR5² in its Order³ which came into force on 19 February 2019 and in effect extended the relevant projects' GCC periods for a specified period. The exemption was granted to address delays to the TR5 process and allow generators to continue supplying renewable energy to the grid without participating in unlawful transmission.

The exemption was pursued and approved on the basis that these delays constitute exceptional circumstances, the causes being:

- more projects progressing to the tender stage than had been expected;
- Ofgem's decision to stagger the invitation to tender phases to address feedback from bidders that it is challenging to pursue multiple projects in parallel; and
- Ofgem consulting on a review of its policy on Income Adjusting Events.

The TR6 projects⁴ in turn suffered both from knock-on effects of the staggered TR5 as well as suddenly being caught in the middle of a global pandemic at the beginning of 2020. The immediate effect of the Covid-19 pandemic meant that certain activities such as site visits which are integral to any due diligence process were delayed significantly due to the lack of available personnel as a result of the restricted movement of people during lockdown. This, combined with general financial uncertainty and the as-yet unknown cumulative knock-on effects of the pandemic, rendered an already incredibly tight timeframe almost impossible. In these circumstances, the SOS granted a TR6-wide exemption in its Order which came into force on 3 October 2020⁵ on the basis that the delays caused by Covid-19 constitute exceptional circumstances. The TR6 exemption provided generators additional time where the SOS was satisfied that:

- the transfer process will be materially impacted by Covid-19; and
- this Covid-19 related disruption materially increases the risk that the generator, taking reasonable steps to complete the transfer, would be unable to complete the transfer process within the required timeframes.

"While an exemption appears to be an extension to the commissioning period for the affected project, it is essentially a waiver from the offence provision of s4 EA 1989 granted by the SOS for a prescribed period of time."

We note that Rampion Offshore Wind Farm, which had already benefited from the TR5 exemption, was sufficiently delayed such that it also received a further exemption to 27 November 2021⁶.

While an exemption appears to be an extension to the commissioning period for the affected project, it is essentially a waiver from the offence provision of s4 EA 1989 granted by the SOS for a prescribed period of time. There is no mechanism in the legislation to formally extend a project's GCC.

Ultimately, any exemption under s5 is only a temporary fix and does not address the wider issue emerging that the 18-month GCC is no longer appropriate for offshore wind farm projects of the size, scale and complexity that are now being developed in the UK.

UNINTENDED CONSEQUENCES

Because the GCC is enshrined in primary legislation, without an extension mechanism that is fit for purpose, there are a number of unintended consequences:

"A breach of the GCC is a strict liability criminal offence (i.e. a prosecuting body does not need to prove intent) with additional personal liability of directors and officers potentially attaching by virtue of s108 EA 1989."

- Criminal offending – a breach of the GCC is a strict liability criminal offence (i.e. a prosecuting body does not need to prove intent) with additional personal liability of directors and officers potentially attaching by virtue of s108 EA 1989;
- Possible consequences under the Proceeds of Crime Act 2002 ("POCA") – either by way of separate, additional principal money laundering offences under ss327-329 POCA (which also carry potential personal liability for directors and officers) or by way of confiscation proceedings following a successful prosecution under s4 EA 1989 to confiscate unlawful revenue obtained during the period of unlawful transmission;
- Impact on bankability of projects – as s4 is a strict liability offence, even if a generator is not prosecuted the offence has still been committed and the fact that an offence has been committed is likely to raise issues relating to potential breach of "ever-green" confirmations and repeated warranties, corporate policies, and the Crown Estate Lease for the wind farm. This together with the threat of any associated POCA proceedings, is clearly a red flag for lenders and investors, and can itself be the cause of delays in the transaction;
- Conflicting behavioural drivers for generators – between the GCC and legally binding net zero emissions targets;
- Unfair commercial advantage – a breach of the GCC only carries consequences for the generator which therefore tilts the balance of negotiations unfairly to the bidder as both parties are not equally incentivised to reach agreement within the 18-month period. The result may be the generator conceding points in negotiations that it would not have otherwise conceded, in order to get the deal done; and
- Ongoing investment in renewables energy – runs counter to the interests of good regulation and creates a poor climate for investment which threatens to undermine investment in offshore wind in the UK. Extrapolating this worst case further, it could act as a perverse incentive to stop renewable generation, leaving us relying on fossil fuel alternatives.

Exceeding the GCC results in a generator committing a criminal offence, unless the project stops generating until there is an OFTO in place. This is clearly not in the wider interests of the decarbonisation agenda and, given that the net zero emissions target was enacted after the GCC, the urgency of the action required to mitigate the effects of climate change were not contemplated.

WHAT NEXT?

It has become abundantly clear from the experience of the last two tender rounds that the 18-month GCC is no longer sufficient to address the purposes that it was originally intended for in the UK's fast maturing and complex offshore wind market (see our article on ever larger projects [here](#)); it has become a regulatory beartrap for generators. The crucial question for Ofgem, the Government, and stakeholders is how to address this. There seems to be a prevailing preference for some sort of time limit with most discussion centred on extending the GCC. This, in our view, however simply kicks the can down the road.

So, what is the solution? We would suggest that simplicity is key. The most effective solution would be to amend the primary legislation to state that the GCC does not apply where the generator is currently in a tender process run by Ofgem and, therefore, any transmission in these circumstances would not fall foul of the s4 prohibition. While the original intention behind the GCC was, in part, to incentivise transactions to complete in a timely fashion, there are already significant and sufficient commercial incentives and the fact that any breach of the GCC unfairly penalises only one party militates towards the view that these transactions should not be caught by the GCC at all. If Ofgem or the Government remain concerned that the removal of this prohibition will disincentivise generators from divesting their transmission assets in a timely fashion in order to benefit from additional revenue (which is not an issue that we have seen any evidence of) then a less draconian response could be by conferring on Ofgem the power to issue civil penalties where it considers that either party (generator or preferred bidder) is causing undue delay.

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If you would like to discuss any of the issues raised in this article, please contact the authors.

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Rachael Davidson, a former senior associate in our London office, also contributed to this article.

[1] Section 4 EA 1989.

[2] Race Bank Offshore Wind Farm, Walney Extension Offshore Wind Farm, Galloper Offshore Wind Farm, Rampion Offshore Wind Farm all received individual exemptions. The OFTO divestment for Dudgeon completed November 2018 and therefore did not require an exemption.

[3] The Electricity (Individual Exemptions from the Requirement for a Transmission Licence) (England and Wales) Order 2019.

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[4] Beatrice Offshore Wind Farm, Hornsea One Offshore Wind Farm, and East Anglia One Offshore Wind Farm.

[5] The Electricity (Individual Exemptions from the Requirement for a Transmission Licence) (Coronavirus) Order 2020.

[6] Article 3 of The Electricity (Individual Exemptions from the Requirement for a Transmission Licence) (Coronavirus) Order 2020.

KEY CONTACTS



NICK WALKER
PARTNER • LONDON

T: +44 20 3036 9822

nwalker@wfw.com



MARIANNE ANTON
COUNSEL • LONDON

T: +44 20 3314 6330

manton@wfw.com

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